U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 April 2003

CASE NO. 2002-LHC-2300

OWCP NO.: 07-152082

IN THE MATTER OF

JIMMY BOND,
Claimant

v.

HAM MARINE, INC.,
Employer

EAGLE PACIFIC INSURANCE CO.,
Carrier

APPEARANCES:

Tommy Dulin, Esq.
On behalf of Claimant

Michael J. McElhaney, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Jimmy Bond (Claimant) against Ham Marine, Inc., (Employer), and Eagle Pacific Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 16, 2003, in Biloxi, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty exhibits which were admitted, including: various Department of Labor filings; Employer's offshore safety investigation report; a memorandum of the informal conference; Claimant's personnel file; the medical records of Drs. M. F. Longnecker, Charles Winters, John Cope, and Vernon Doster; a VR psychometric/psychological evaluation; the depositions of Drs. Longnecker and Cope; and a photo of the surgery site.[1] Employer introduced thirty exhibits, which were admitted, including: various Department of Labor filings; a petition for Section 8(f) relief; witness statements by Bryan Byrd; Claimant's personnel and wage records; Employer's incident/investigation report; Claimant's discovery responses; Claimant's Social Security earnings report; a vocational rehabilitation report and labor market survey; the depositions and medical records of Drs. M. F. Longnecker and John W. Cope; the medical records of Drs. Charles Winters and Vernon Doster; reports from Rehability, Inc., reports from Quest Investigation; the deposition of Claimant; the payroll records from Claimant's previous employers, Inc; and ROI reports.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on February 15, 1999, in the course and scope of employment during an employer-employee relationship;

2. Employer was advised of the injuries on February 15, 1999;

3. Employer filed a Notice of Controversion on October 30, 2000;

4. An informal conference was held on June 10, 2002;

5. Employer paid compensation benefits as follows:
Temporary total disability from February 16, 1999 to May 24, 1999, totaling $4,371.64
Temporary total disability from August 20, 2002 to October 14, 2002, totaling $2,051.99
Permanent partial disability for a 40% impairment to the left leg totaling $35,972.35
Permanent partial disability for a 5% impairment to the left leg totaling $4,496.94;

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

6. Employer paid medical benefits;

7. Claimant has a permanent partial disability to his left leg of 45%; and

8. Claimant reached maximum medical improvement first on December 21, 1999, and again on October 14, 2002, after removal of his hardware.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Average weekly wage;

2. Nature and extent of disability;

3. Section 8(f) relief; and

4. Attorney fees, penalties, interest, and costs.

III. STATEMENT OF THE CASE

A. Chronology

Claimant, born on September 20, 1954, testified that he lived in Gulfport, Mississippi, and had an eighth grade education. (Tr. 19). Claimant's past work experience included mechanic work, welding, fitting, and truck driving. (Tr. 20). In 1999, Claimant began to work for Employer as a shipfitter. (Tr. 20). On February 15, 1999, Claimant testified that he fell approximately twelve feet injuring his eye, leg and hip, which necessitated surgery. (Tr. 21). On February 17, 1999, Dr. Cope performed open reduction internal fixation on Claimant's leg, and installed hardware to fix a basilar neck fracture near the left hip. (CX 16, p. 32). On May 17, 1999, Dr. Cope remarked that Claimant should remain off work, he was going to have some notable degree of permanent impairment, and Claimant would soon be able to resume light duty employment. (CX 16, p.15). Also in May, 1999, Claimant began treatment with Dr. Doster for hypertension. (CX 17, p. 4). By June 3, 1999, Dr. Cope approved Claimant's return to work at light duty, which Claimant had begun on May 25, 1999. (Tr. 22; CX 16, p. 13). Claimant did not work as many hours as before his injury, and Employer eventually started paying him for the hours he worked instead of continuing his compensation benefits based on his pre-injury wages. (Tr. 22).

On June 10, 1999, Dr. Cope stated that Claimant had a delayed union fracture. (CX 16, p. 10). On August 18, 1999, Dr. Cope informed Claimant that he was moving to Georgia and he transferred Claimant's care to Dr. Longnecker. *Id*. at 5. Based on Claimant's unwillingness to

undergo further surgery, Dr. Cope assessed that Claimant was at maximum medical improvement with a forty-percent permanent partial disability rating and permanent light duty restrictions of sitting down with very limited walking. *Id*. On December 21, 1999, Dr. Longnecker opined that Claimant's hip fracture had healed without any evidence of aseptic necrosis. (CX 13, p. 4). Dr. Longnecker opined that Claimant had reached maximum medical improvement with the caveat that Claimant would need future x-rays to rule out aseptic necrosis and Claimant may want his hardware removed during the following summer. *Id*. In January, 2000, Employer terminated Claimant's light duty job as part of a larger reduction in force. (Tr. 23). Claimant did not seek another job. (Tr. 23).

On May 13, 2002, Claimant returned to Dr. Longnecker, after three and one-half years, complaining of worsening hip pain over the last six months. (CX 13, p. 3). Claimant expressed a desire to remove the hardware from his hip, and Dr. Longnecker noted that Claimant had developed a bursal formation over his hardware and agreed with Claimant that it should be removed. (CX 18, p. 6). After completing the hardware removal, Dr. Longnecker remarked on October 14, 2002, that Claimant's hip pains would likely be permanent, Claimant had reached maximum medical improvement and had sustained an additional five-percent permanent partial impairment to his lower extremity. (CX 13, p. 1). Claimant was capable of performing sedentary work, but would not be able to return to work at the shipyard. *Id*.

B. Claimant's Testimony

Claimant testified that following his termination by Employer, he looked around for work but no one seemed to be interested in hiring him for sit-down work with his limited educational skills. (Tr. 24). Also, after suffering his workplace injury and having his physical activities limited, Claimant testified that he gained nearly one-hundred pounds. (Tr. 24). Apart from his workplace injury, Claimant suffers from hypertension and a heart condition. (Tr. 24-25).

Regarding the affects of his workplace injury, Claimant testified that he sometimes just had to elevate his left leg, and he related that his left leg would fail on him if he tried to walk long distances. (Tr. 25). Claimant was aware that following his hardware removal by Dr. Longnecker a broken screw was lodged in his femur, and he related that he had a certain degree of daily pain in his left hip. (Tr. 26). On a typical day Claimant made dinner, washed cloths, watched movies, and visited with friends. (Tr. 28). Claimant was no longer able to maintain his yard and had been cited by the city of Gulfport to clean up his yard on account of the weeds that were growing there. (Tr. 28).

Regarding the jobs identified by Employer's vocational counselors, Claimant testified that he would not likely be able to perform the job as a shuttle bus driver because of his pain medication. (Tr. 30). Claimant could not be a local truck driver because he did not think that he would be able to pass the required Department of Transportation physical. (Tr. 30-31). Claimant did not think he could perform the job at PFG Precision Optics in Ocean Springs because it was too far to travel and Claimant needed a flexible schedule that would allow him to choose which days he could work. (Tr. 31). The job for Swetman Security was not an option, because Claimant's nerves dictated that he try to avoid conflicts. (Tr. 31). Claimant did not travel to D&M Fans and Lighting in Picayune,

Mississippi because it was too far away, and he did not see any point in applying for a job that would require him to stick to a schedule. (Tr. 32). Regarding the light duty job for Employer that Claimant worked at from May to December 1999, he stated that the position entailed sitting down in a guard shack and did not entail walking around the parking lot. (Tr. 35). Regular guards checked individuals in and out of the facility, and Claimant's job was to write a report when a person arrived late for work. (Tr. 35). Claimant stated that his current medications consisted of two Ultrams a day, Lipitor, and between four and five medications for his blood pressure. (Tr. 32).

C. Testimony of Ricky Dean Parker

Mr. Parker, Employer's former corporate safety director at the time of Claimant's injury, testified that Employer did have a reduction in force after it completely shut down one rig for non-payment and scaled back work on two others due to financial difficulties. (Tr. 48-49). Claimant's job entailed building or repairing rigs, and there would be periods when all the rigs would be deployed and Claimant would not have any work. (Tr. 49-50). In 1999, Employer had nearly 4,000 employees, but by the time it declared bankruptcy in April, 2000, it only had about 1,000 employees. (Tr. 50). Presently, Employer was hiring workers for all crafts, and it was hiring on October 14, 2002. (Tr. 50). Mr. Parker opined that with Claimant's years of experience in the craft of welding, he would be well suited to a job in the tool room. (Tr. 51). Mr. Parker was not sure if Employer was hiring guards, but it was likely considering that there was a high turnover ratio for that position. (Tr. 52). A job as a guard paid $7.00 per hour and a job in the tool room paid twelve to fourteen dollars an hour. (Tr. 52).

D. Exhibits

(1) Claimant's Personnel File

On January 18, 1999, Employer hired Claimant as a fitter at $15.00 per hour. (CX 12, p. 19). On January 9, 2000, Claimant's position was eliminated after a reduction in force and Claimant was not marked as eligible for rehire. (CX 12, p. 13). Claimant's job performance and attendance were satisfactory, but his evaluator assessed poor attitude and safety habits. *Id*.

For pay period ending January 24, 1999, Claimant grossed $971.25 reflected by 56.50 hours of work. (CX 12, p. 20). On January 31, 1999, Claimant earned $757.50 working 47 hours. *Id*. On February 7, 1999, Claimant earned $600.00 for 40 hours of work. *Id*. at 20-21. On February 14, 1999, Claimant earned $937.50 in 55 hours of work. *Id*. at 21.

From pay period ending on May 28, 1999 to pay period ending on December 30, 1999, Claimant worked 1,001.25 regular hours earning $15,018.75, worked ninety overtime hours and 4 other hours for a total gross pay of $15,468.75. (CX 12, p. 14). In the first weeks of the year 2000, Claimant made the following gross pay: January 2, 2000 - $480.00 (24 regular hour and 8 holiday hours); January 14, 2000 - $360.00 (24 regular hours); for a total of $840.00. *Id*. at 15-18.

(2) Claimant's Social Security Earnings Report

Claimant's Social Security Earnings Report indicated that in 1999 Claimant earned $18,371.00 from Employer. (EX 16, p. 6). In 1998, Claimant earned $17,145.32 from Blackburn Maintenance Inc., and earned $1,424.65 from Technical Employment Services, Inc., for a total of $18,569.97. *Id*. In 1997, Claimant earned $1,583.78 from Technical Employment Services, Inc, $1,640.25 from Odessy Resource Management of Miss., Inc., and $9,608.98 from Avondale Industries, Inc., for a total of $12,833.01. *Id*. at 5-6.

(3) Claimant's Personnel File at Northrop Grumman & Technical Employment Services, Inc.

Claimant worked for Northrop Grumman from March 14, 1997 to September 24, 1997. (EX 27, p. 2). He was initially hired on March 14, 1999 as a shipfitter, but he voluntarily quit on September 24, 1997. *Id*. at 2, 10. During 1997, Claimant earned $9,977.26. *Id*. at 22.

On December 3, 1997, Technical Employment Services, Inc. hired Claimant. (EX 28, p. 2). His W-2, Wage and Tax statement for 1997 reflected that Claimant earned $1,583.78 during 1997. *Id*. at 7. In 1998, Claimant worked until February 25, working 196.7 hours and earning $1,424.65. *Id*. at 9, 11. Also during 1998, Claimant's W-2 statements indicated that he earned $16,095.32 from Blackburn Construction, Inc., and $1,050.00 from Blackburn Maintenance, Inc. *Id*. at 12-13.

(4) Medical Records and Deposition of Dr. John Cope

On February 15, 1999, Dr. Cope noted that Claimant fell at work and was admitted to the hospital for further treatment. (CX 16, p. 32). X-rays revealed a left hip and base neck fracture and Dr. Cope assessed a basilar neck fracture of the left hip. *Id*. Based on his condition, Dr. Cope recommended open reduction internal fixation, and Claimant consented to surgery scheduled for February 17, 1999. *Id*. On February 20, 1999, Claimant was discharged on crutches in satisfactory condition. *Id*. at 35. On February 24, 1999, Dr. Cope continued Claimant's no work status, and recommended that Claimant continue the use of his crutches. *Id*. at 28. Dr. Cope anticipated six months of treatment, an ability to return to light duty work in two to three months, an anticipated maximum medical improvement date in the next six to twelve months with an anticipated permanent partial impairment of 0-30% for the leg. *Id*. at 27. On March 25, 1999, Dr. Cope recommended that Claimant should continue to use crutches and increase his weight bewaring activity as tolerated, and he continued his recommendation that Claimant should remain off from work. *Id*. at 25. By April 26, 1999, Dr. Cope approved the use of a cane, and he continued Claimant's physical therapy. *Id*. at 18.

On May 17, 1999, Dr. Cope remarked that Claimant should remain off work, he was going to have some notable degree of permanent impairment, and Claimant would soon be able to resume light duty employment. (CX 16, p. 15). By June 3, 1999, Dr. Cope approved Claimant's return to work at light duty, which Claimant had begun prior to his office appointment. *Id*. at 13. After

reviewing tomograms that demonstrated a healing fracture, Dr. Cope opined on June 10, 1999, that Claimant had a delayed union fracture. *Id*. at 10. Dr. Cope also issued official work restrictions of sitting down only, very limited walking and instructed Claimant to use a cane. *Id*. at 9. On July 21, 1999, Dr. Cope noted Claimant continued to walk with a cane, he was able to tolerate an eight hour work day performing office functions and Claimant was using an EBI four hours a night during the past two weeks. *Id*. at 10. Dr. Cope consulted with Claimant about his level of pain, and noted that without any obvious deterioration he would not recommend any further surgery, such as a bone graft, to improve Claimant's condition. *Id*. at 6. In the long term, Claimant may need a bipolar or total hip replacement and Dr. Cope theorized that Claimant's final disability would be between thirty-five and fifty percent to his lower extremity. *Id*. On August 18, 1999, Dr. Cope informed Claimant that he was moving to Georgia, and he transferred Claimant's care to Dr. Longnecker. *Id*. at 5. Based on Claimant's unwillingness to undergo further surgery, Dr. Cope assessed that Claimant was at maximum medical improvement[2] with a forty-percent permanent partial disability rating and permanent light duty restrictions of sitting down with very limited walking. *Id*. Claimant was not able to return to work as a structural fitter based on his condition in August, 1999. (CX 19, p. 36).

Regarding the need to remove the hardware form Claimant's hip, Dr. Cope stated that it should not come out unless it was causing irritation or Claimant was undergoing a hip replacement. (CX 19, 23). Regarding Dr. Longnecker's May 13, 2002 note that Claimant was experiencing worsening pain over the last six months, and regarding Dr. Longnecker's recommendation to remove the hardware from Claimant's hip, Dr. Cope stated that Claimant was likely developing bursitis related to the retained hardware and irritation around the plate. *Id*. at 28-29. Removal of Claimant's hardware at this time was appropriate, it was something that Dr. Cope had considered, and Dr. Cope was surprised that nothing more drastic needed to be done. *Id*. at 34. Recovering from the removal of hardware generally lasted twelve to sixteen weeks to give the bone a chance to form in the screw holes to prevent stress risers. *Id*. at 38.

Concerning Claimant's hypertension, Dr. Cope stated that he did not treat Claimant for that problem, but his experience was that when people were in pain their blood pressure would increase. (CX 19, p. 32). Dr. Cope rated Claimant's limp as moderate to severe in nature. *Id*. at 33.

(5) Medical Records of Rehability Center

On April 8, 1999, after five days of physical therapy, Claimant's evaluator remarked that he made progress with an increased active range of motion and increased left hip strength. (EX 24, p.

[2] Dr. Cope explained that he normally assessed a date for maximum medical improvement six months after injuries such as the one Claimant sustained. (CX 19, p. 20). His assessment was not based on the fact that he was leaving town, but was based on the fact that Claimant elected not to pursue further surgical options, the absence of any evidence of instability, and on the fact that there was more than partial healing present. *Id*.

1). Claimant had moderate functional impairments in his gait, passive, and active range of motion. *Id*. at 2. Claimant suffered a minimal impairment in strength, and had normal impairments in neurological functioning an in palpation. *Id*.

(6) Medical Records of Dr. Vernon Doster

On May 13, 1999, Dr. Doster prescribed medication for hypertension. (CX 17, p. 4). Dr. Doster also treated Claimant for hypertension on November 30, 1999, and June 12, 2000. *Id*. On January 8, 2001, Claimant complained to Dr. Doster that he needed medication for nervousness because he lost his mother, he went through a divorce, was trying to get Social Security, and he was "fighting" with his former employer. *Id*. at 1. On May 7, 2001, Claimant received a refill of his blood pressure medication, and Dr. Doster told Claimant he was to return as needed. *Id*.

(7) Medical Records and Deposition of Dr. M. F. Longnecker

On September 1, 1999, Dr. Longnecker evaluated Claimant in relation to a fracture of the baslar neck, left hip. (CX 13, p. 15). Although the internal fixation of the fracture had positioned well, Claimant had delayed healing and two months ago he was placed on an external bone simulator. *Id*. Dr. Longnecker opined that such treatment was appropriate. *Id*. Claimant was working limited duty (limited climbing, walking and sitting down) and Dr. Longnecker advised Claimant that if he did not heal then he would have to undergo a bone graft. *Id*. Dr. Longnecker also noted that Dr. Cope asked him to take over Claimant's case because Dr. Cope was moving. *Id*.

Reviewing x-rays, Dr. Longnecker noted a baslar neck fracture without evidence of collapse of the weight bearing dome of the femoral head. (CX 13, p. 15). Claimant no longer needed the external bone simulator and Dr. Longnecker recommended a continuation of Claimant's limited activity. *Id*. On September 29, 1999, Dr. Longnecker noted that Claimant still had soreness, but x-rays demonstrated that his hip was healing without evidence of aseptic necrosis. *Id*. at 12. Dr. Longnecker opined that everything looked good, but it would take another four to six months before he could be sure Claimant's hip would heal without complications. *Id*. Dr. Longnecker assigned work restrictions of limited walking, climbing, sitting, and limited Claimant to sit-down work only. *Id*. at 14. On Claimant's October 29, 1999 visit, Dr. Longnecker remarked that Claimant was doing reasonably well. *Id*. at 10. Claimant's new work restrictions limited his standing and walking, and Dr. Longnecker did not want Claimant performing any climbing or deep knee bends. *Id*. at 9.

On November 9, 1999, Dr. Longnecker opined that Claimant would not reach maximum medical improvement for another four to six months because Claimant's hip was not completely healed and there was no way of knowing whether Claimant would develop aseptic necrosis. (CX 13, p. 8). Dr. Longnecker agreed with Dr. Cope's assessment that Claimant would endure a forty-percent permanent partial impairment to his lower extremity, which he equated to a twenty-percent whole body impairment. *Id*. On December 21, 1999, Dr. Longnecker noted that Claimant continued to walk with a limp and he continued Claimant's light duty restrictions. *Id*. at 4. After reviewing x-rays, Dr. Longnecker opined that Claimant's hip fracture had healed without any evidence of aseptic

necrosis. *Id*. Claimant had reached maximum medical improvement with the caveat that Claimant would need future x-rays to rule out aseptic necrosis and Claimant may want his hardware removed during the following summer. *Id*. In addition to a forty- percent impairment rating to his lower extremity, Claimant's permanent work restrictions were: no prolonged standing, walking, and/or climbing. *Id*.

On May 13, 2002, Claimant returned to Dr. Longnecker, after three and one-half years, complaining of worsening hip pain over the last six months. (CX 13, p. 3). Although Claimant limped, he was neurologically intact. *Id*. X-rays demonstrated that Claimant's fracture was well healed with no evidence of aseptic necrosis. *Id*. Claimant expressed a desire to remove the hardware from his hip, and Dr. Longnecker opined it could be done over a two day hospital stay. *Id*. Claimant had developed a bursal formation over his hardware and Dr. Longnecker agreed with Claimant that it should be removed. (CX 18, p. 6). Dr. Longnecker anticipated a period of recovery lasting about three to four weeks. *Id*. at 7. After completing the hardware removal, Dr. Longnecker remarked on October 14, 2002, that Claimant's hip pains would likely be permanent, Claimant had reached maximum medical improvement and had sustained an additional five-percent permanent partial impairment to his lower extremity. (CX 13, p. 1). Claimant was capable of performing sedentary work, but would not be able to return to work at the shipyard. *Id*.

(8) Medical Records of Dr. Charles Winters

On July 5, 2000, Dr. Winters evaluated Claimant's left hip following Dr. Cope's open reduction. (CX 15, p. 1). Claimant's fracture had healed nicely, Claimant still reported pain, and Claimant wanted to know Dr. Winter's opinion about whether his hardware needed to be removed. *Id*. Dr. Winters opined that removal of the hardware was a judgment call and he explained to Claimant that if the hardware was left in place then it could cause stress shielding of the bone, a stress riser at the end of the plate, and potential infection. *Id*. The risk of removing the hardware was leaving the bone weakened for a period of time, the danger of a new fracture, the screw hole would be a stress riser, and there was a danger of infection at the time of surgery. *Id*. at 1-2. It was not imperative that Claimant's hardware come out, and if left in, Claimant would need yearly x-rays. *Id*. at 2. Dr. Winters issued work restrictions of no climbing, no prolonged standing, and no prolonged walking. (EX 20, p. 23).

(9) VR Psychometric/Psychological Evaluation

On October 5, 2001, examiner Colleen Bryant noted that Claimant was a forty-seven year old, divorced, white male, who had an eighth grade education, a broken hip, and whose primary occupation was as a welder. (CX 14, p. 1). After completing the Wechsler Adult Intelligence Test, Claimant scored on the borderline range of intellectual functioning. *Id*. Claimant performed on a second grade level in both reading and spelling and could perform arithmetic on a third grade level. *Id*. at 2. As a result, Ms. Bryant and Mr. Rowezee, a rehabilitation psychologist, assessed Claimant as moderately retarded academically in reading and spelling and assessed a specific learning disability in reading and spelling. *Id*. at 3.

(10) Vocational Report and Labor Market Survey of Leon Tingle, and the Testimony of Ty Pennington

On January 8, 2003, Mr. Tingle noted that Claimant was functionally illiterate based on his October 5, 2001 psychometric and psychological evaluation. (EX 17, p. 2). Based on a review of Claimant's medical records, Mr. Tingle concluded that Claimant was able to function somewhere between the sedentary and light duty categories of work. *Id*. at 3. Researching the labor market, Mr. Tingle identified jobs available with current or periodic openings between Claimant's date of injury on February 15, 1999, and his second date of maximum medical improvement of October 14, 2002. *Id*. Those jobs were:

> PFG Precision Optics - Assembler/Inspector. Located in Ocean Springs, Mississippi, this job paid $6.75 per hour. The Inspector position entailed sitting at a workbench and examining components to make sure that they are made to the specifications outlined. It was sedentary/light work that did not require a high school diploma or a GED. The Assembler position required standing while operating machines that form the surface of lenses and was classified as light duty.
>
> Swetman Security - Gate Guard. Located in Biloxi, Mississippi, this job paid a starting salary of $5.50 an hour and did not require a GED. The job entailed checking credentials and authorization for entry to and from industrial facilities. The job was sedentary/light duty and the worker could alternate sitting and standing.
>
> D&M Fans & Lighting - Bench Technician. Located in Picayune, Mississippi, this job paid $6.00 per hour. No experience was necessary and on the job training was provided. The employee dissembled and repaired ceiling fans, lifting was no more than twelve pounds, and the job was categorized as sedentary or light duty.
>
> President Casino - Shuttle Bus Driver. Located in Biloxi, Mississippi, this job paid $7.00 per hour. The job entailed transporting employees to and from the employee parking lot, picking up VIP patrons, and the job was classified as light/medium level work that allowed the worker to alternate sitting and standing. A commercial drivers license was required but a GED was not. All shuttle buses had an automatic transmission and the worker must have the ability to work well with the public.
>
> Gulf Coast Security Services - Security & Gate Guard. Located in Bay St. Louis, Mississippi, this position pad $6.00 per hour for a 32 to 40 hour work week. No prior experience was necessary and the job duties for the security position entailed having a "presence" in and around bank locations. The gate guard position required the worker to check vehicles in and out of off site facilities.

> Fredie Goldman - Tool Room Clerk. Located in Pascagoula, Mississippi, starting pay for this position was $10.00 per hour. The job entailed receiving, storing, and issuing hand tools to employees, stocking inventory, inspecting and measuring tools, and performing bench repair. Occasional stooping, kneeling, and crouching were required and the worker had to lift up to 30 pounds. The job was required light to medium levels of exertion.

(EX 17, p. 3-4).

On January 10, 2003, Ty Pennington, also a rehabilitation counselor, issued a follow-up report after meeting with Claimant on January 9, 2003. (EX 17, p. 5). At that meeting Claimant informed Mr. Pennington that he was unable to work a forty hour week, and Claimant doubted whether he could pass a Department of Transportation physical exam to obtain clearance for a commercial driver's license. *Id*. Mr. Pennington then contacted President Casino and learned that the employer did not require a driver to pass a DOT physical as long as they held a valid commercial driver's license, which Claimant still maintained. *Id*. at 6-7. Based on his interview with Claimant, Mr. Pennington stated that the jobs earlier identified were still viable opportunities for Claimant. *Id*. at 7. Claimants' attorney sent Mr. Tingle's vocational report and labor market survey to Dr. Longnecker who opined that Claimant could perform any of the listed jobs on a trial basis subject to his issued work limitation. (EX 30, p. 1).

Mr. Pennington testified that he never reviewed records concerning Claimant's heart condition. (Tr. 40). Mr. Pennington also testified that the jobs identified in the labor market survey were available at the time Claimant reached maximum medical improvement. (Tr. 44). Regarding the job identified with Fredie Goldman, Mr. Pennington stated that Claimant had no experience as a tool room attendant. (Tr. 44). After having a discussion with Dr. Longnecker, Mr. Pennington stated that Claimant was not consuming any prescription medication that prevented him from performing any of the jobs identified. (Tr. 46).

IV. DISCUSSION

A. Contention of the Parties

Claimant argues that Employer failed to establish a post-injury wage earning capacity and as a result Claimant is totally and permanently disabled due to his scheduled member injury. Alternatively, Claimant contends that his forty-five percent disability to his left leg, and his other symptoms, render him totally and permanently disabled. Claimant asserts that he diligently attempted to find work but was unable to find a suitable position based on his physical condition. Under Section 10 of the Act, Claimant asserts that Employer miscalculated Claimant's average weekly wage, which should reflect an average weekly earning capacity of $816.56, and if Claimant's earning from TESI are included, his average weekly wage would be $564.29. Also, following his workplace injury, Claimant returned to work in Employer's light duty program, earning substantially less than before his injury. Claimant asserts that he is entitled to a period of temporary partial disability benefits during

his light duty employment. Claimant further asserts alternative relief asking the Court to find that he has a sixty-five percent permanent impairment to his left leg based on Claimant's testimony. Additionally, Claimant asks the Court in the alternative to find that he has an unscheduled injury to his hip and back entitling him to a permanent total or a permanent partial award.

Employer contends that Claimant's five weeks of employment makes a Section 10(a) computation inapplicable and under Section 10(c), taking into consideration Claimant's past employment, his average weekly wage totaled $357.11 per week. Merely focusing on Claimant's short employment with Employer artificially inflated Claimant's earning capacity because the nature of his work, rig repair, was dependent on the availability of that work and sometimes such a worker would have no job to perform. Claimant had numerous employers, and averaging Claimant's earnings together for the past five years resulted in an average weekly earning capacity of $384.70. Employer further asserted that Claimant sustained a scheduled injury to his leg, not his hip, and once Employer established the suitable alternative employment was available to Claimant then Claimant was only entitled to receive compensation according to the schedule. Employer asserts its vocational counselor identified suitable alternative employment as of the date Claimant reached maximum medical improvement.

B. Nature and Extent of Disability and Date of Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2002). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168 (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

B(1) Nature of Claimant's Injury

On February 15, 1999, Dr. Cope noted that Claimant fell at work and was admitted to the hospital for further treatment. (CX 16, p. 32). X-rays revealed a left hip and base neck fracture and Dr. Cope assessed a basilar neck fracture of the left hip. *Id*. Based on his condition, Dr. Cope recommended open reduction internal fixation, and Claimant consented to surgery scheduled for February 17, 1999. *Id*. After reviewing tomograms that demonstrated a healing fracture, Dr. Cope opined on June 10, 1999, that Claimant had a delayed union fracture. *Id*. at 10. Dr. Cope consulted with Claimant about his level of pain, and noted that without any obvious deterioration he would not recommend any further surgery, such as a bone graft, to improve Claimant's condition. *Id*. at 6. Meanwhile, Claimant also began treatments with Dr. Doster for pre-existing hypertension. (CX 17, p. 4).

On September 1, 1999, Dr. Longnecker evaluated Claimant in relation to a fracture of the basilar neck, left hip. (CX 13, p. 15). Although the internal fixation of the fracture had positioned well, Claimant had delayed healing and two months ago he was placed on an external bone simulator. *Id*. Reviewing x-rays, Dr. Longnecker noted a basilar neck fracture without evidence of collapse of the weight bearing dome of the femoral head. (CX 13, p. 15). On September 29, 1999, Dr. Longnecker noted that Claimant's hip was healing without evidence of aseptic necrosis. *Id*. at 12. On November 9, 1999, Dr. Longnecker opined that Claimant's hip fracture had healed without any evidence of aseptic necrosis. *Id*. at 8.

On May 13, 2002, Claimant returned to Dr. Longnecker, after three and one-half years, complaining of worsening hip pain over the last six months. (CX 13, p. 3). Claimant expressed a desire to remove the hardware from his hip, Dr. Longnecker noted Claimant had developed a bursal formation over his hardware, and Dr. Longnecker agreed with Claimant that it should be removed. (CX 18, p. 6). After completing the hardware removal, Dr. Longnecker remarked on October 14, 2002 that Claimant's hip pains would likely be permanent. Accordingly, I find that the nature of Claimant's injury is a fracture of the basilar neck fracture in claimant left lower extremity,[3] status-post reduction internal fixation with hardware, a delayed union, status-post hardware removal, and permanent hip pain.

[3] The evidence shows that Claimant hip was not the member that was affected. Rather, the basilar neck is located just below the hip. (CX 19, p. 23); (EX 18, p. 8). Also, there is insufficient evidence that Claimant has a disabling back problem or that his workplace injury caused a low back condition. (CX 19, p. 29-30) (statement by Dr. Cope that he had no memory of complaints of low back pain; (EX 18, p. 10-11) (statement by Dr. Longnecker that he had no memory of any back problems).

B(2) Extent of Claimant's Injury

On the day Claimant was injured, February 15, 1999, Claimant was taken to the hospital where Dr. Cope performed surgery on Claimant's left leg consisting of a reduction internal fixation with hardware. (CX 16, p. 32). On February 20, 1999, Claimant was discharged on crutches in satisfactory condition. *Id*. at 35. On February 24, 1999, Dr. Cope noted that Claimant was in a continuing no work status. *Id*. at 28. Dr. Cope anticipated six months of treatment, an ability to return to light duty work in two to three months, and an anticipated maximum medical improvement date in the next six to twelve months with an anticipated permanent partial impairment of 0-30% for the leg. *Id*. at 27. On March 25, 1999, Dr. Cope recommended that Claimant should continue to use crutches and increase his weight bearing activity as tolerated, and he continued his recommendation that Claimant should remain off from work. *Id*. at 25.

On May 17, 1999, Dr. Cope remarked that Claimant should remain off work, he was going to have some notable degree of permanent impairment, and Claimant would soon be able to resume light duty employment. (CX 16, p. 15). On April 8, 1999, after five days of physical therapy, Claimant's evaluator remarked that he made progress with an increased active range of motion and increased left hip strength. (EX 24, p. 1). Claimant had moderate functional impairments in his gait, passive, and active range of motion. *Id*. at 2. Claimant suffered a minimal impairment in strength, and had normal impairments in neurological functioning and in palpation. *Id*. By June 3, 1999, Dr. Cope approved Claimant's return to work at light duty, which Claimant had begun prior to his office appointment. (CX 16, p. 13). On June 10, 1999, Dr. Cope issued official work restrictions of sitting down only, very limited walking, and he instructed Claimant to use a cane. *Id*. at 9. On July 21, 1999, Dr. Cope noted Claimant continued to walk with a cane, and he was able to tolerate an eight-hour work day performing office functions. *Id*. at 10. Dr. Cope theorized that Claimant's final disability would be between thirty-five and fifty-percent to his lower extremity. *Id*. at 6. On August 18, 1999, Dr. Cope assessed a forty-percent permanent partial disability rating and issued permanent light duty restrictions of sitting down with very limited walking. *Id*. Claimant was not able to return to work as a structural fitter based on his condition in August, 1999. (CX 19, p. 36).

On September 1, 1999, Dr. Longnecker noted Claimant was working limited duty. (CX 13, p. 15). On September 29, 1999, Dr. Longnecker noted that everything looked good, but it would take another four to six months before he could be sure Claimant's hip would heal without complications. *Id*. Dr. Longnecker assigned work restrictions of limited walking, climbing, sitting, and limited Claimant to sit-down work only. *Id*. at 14. On Claimant's October 29, 1999 visit, Dr. Longnecker remarked that Claimant was doing reasonably well. *Id*. at 10. Claimant's new work restrictions limited his standing and walking, and Dr. Longnecker did not want Claimant performing any climbing or deep knee bends. *Id*. at 9.

On November 9, 1999, Dr. Longnecker agreed with Dr. Cope's assessment that Claimant would endure a forty-percent permanent partial impairment to his lower extremity, which he equated to a twenty- percent whole body impairment. (CX 13, p. 8). On December 21, 1999, Dr. Longnecker

noted that Claimant continued to walk with a limp and he continued Claimant's light duty restrictions. *Id*. at 4. In addition to a forty-percent impairment rating to his lower extremity, Claimant's permanent work restrictions were: no prolonged standing, walking, and/or climbing. *Id*. On July 5, 2000, Dr. Winters evaluated Claimant's left hip following Dr. Cope's open reduction. (CX 15, p. 1). Dr. Winters issued work restrictions of no climbing, and no prolonged standing or walking. (EX 20, p. 23).

On May 13, 2002, Claimant returned to Dr. Longnecker, after three and one-half years, complaining of worsening hip pain over the last six months. (CX 13, p. 3). Although Claimant limped, he was neurologically intact. *Id*. After completing the hardware removal, Dr. Longnecker remarked on October 14, 2002, that Claimant's hip pains would likely be permanent, Claimant had reached maximum medical improvement, and he had sustained an additional five-percent permanent partial impairment to his lower extremity. (CX 13, p. 1). Claimant was capable of performing sedentary work, but would not be able to return to work at the shipyard. *Id*.

Accordingly, I find that Claimant was totally disabled from February 16, 1999 to May 24, 1999.[4] After May 24, 1999, I find that Claimant was able to return to work with the limitation that he only perform sit-down work and do very limited walking. These restrictions continued until October 29, 1999, when Dr. Longnecker approved Claimant for work limitations consisting of limited standing, limited walking, and no climbing or deep knee bends. On December 21, 1999, Claimant was able to work with the restrictions that he not engage in prolonged standing, walking, and/or climbing. *Id*. Claimant had a forty-percent impairment to his left lower extremity. On August 30, 2002, Claimant again became totally disabled while undergoing and recovering from Dr. Longnecker's surgery to remove his hardware, and I find that Claimant was able to return to return to sedentary work with an additional five percent impairment to his left lower extremity on October 14, 2002.

B(3) Maximum Medical Improvement

The parties stipulated that Claimant reached maximum medical improvement following his initial surgery on December 21, 1999. (ALJX 1). The parties also stipulated that Claimant reached maximum medical improvement following his hardware removal on October 14, 2002. I find that there is substantial evidence in the records to support these stipulations. (CX 13, p. 4) (Dr. Longnecker opining Claimant reached maximum medical improvement on December 21, 1999); (CX 13, p.1) (Dr. Longnecker opining that Claimant had reached maximum medical improvement following his hardware removal on October 14, 2002).

C. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the

[4] May 24, 1999 is the date Claimant returned to light duty work at Employer's facility. (ALJX 1).

average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1) (2001). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c) (2001); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For both occupational disease and traumatic injury cases, the relevant time for determining a claimant's average weekly wage is when the claimant is actually aware, or should have been aware, of the disability. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161-62 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998).

C(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a) (2001); *See also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000) (stating that Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a) (2001). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co. v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case, Claimant was first hired on January 18, 1999, and he was injured on February 15, 1999. (CX 12, p. 19; ALJX 1). This brief time period cannot be categorized as substantially the whole year and Section 10(a) is not applicable.

C(2) Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c) (2001); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). Section 10(b) applies to an injured employee who has not worked substantially the whole year, and it applies when an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b) (2001). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; *Empire United Stevedores v. Gatlin*, 936 F.2d 821,

822 (5th Cir. 1991). Here there are no wage records of similar employees in the record and Section 10(b) is not applicable.

C(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly," then a determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c) (2001); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297-98 (5th Cir. 2000); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821-22 (5th Cir. 1991); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426 (5th Cir. 2000) (finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991), *rev'd in part*, 86 F.3d 895 (9th Cir. 1996) (upholding ALJ's calculation of claimant's average weekly wage). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings Claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

Claimant testified that his past work experience consisted of mechanic work, truck driving, welding, and shipfitting. (Tr. 20). In 1998, Claimant earned $18,569.97 from Blackburn Maintenance, Inc., Blackburn Construction, Inc., and Technical Employment Services, Inc. (EX 16, p. 6). While Claimant's total earnings from Blackburn Maintenance for calendar year 1998 was submitted in to evidence, Claimant indicated the only worked for that employer off and on during that year. I also note that Blackburn Maintenance is located in Kansas, and while Claimant performed welding work for Blackburn, he was not likely employed in the shipbuilding/repairing industry. (CX

12, p. 19). Also, while Mr. Parker asserted that Claimant would not have a consistent amount of work available to him on a year round basis because there would be periods when all the vessels were deployed, no records were introduced from other shipfitters to demonstrate that Claimant work hours from January 18, 1999 to February 15, 1999, were extraordinary. Under the circumstances, I find the fairest approximation of Claimant's average weekly wage earning capacity is to add all his earning from Employer and to divide that sum by the total number of weeks he was employed. For the twenty-eight days Claimant was employed from January 18, 1999 to February 14, 1999 (4 weeks) Claimant earned $3,266.25. (CX 12, p. 20-21). During that four week time period, Claimant worked a total of 198.5 hours, or an average of 49.625 hours per week. Based on the number of hours Claimant worked, I find that he is most closely associated with a six day a week employee, resulting in a average daily wage of $136.09. (4 weeks x 6 days a week = 24, divided into $3,266.25). Following the formula set forth in Section 10(a), I multiply claimant's average daily wage by 300, which results in an average annual earning capacity of $40, 827.00. Under Section 10(d), Claimant's average weekly wage is one-fifty second of this sum, or $785.13 per week.

D. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

D(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, there is no dispute that Claimant cannot resume his former employment as a shipfitter, thus, Claimant established a *prima facie* case of total disability following his February 15, 1999 workplace accident.

D(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir.

1991)(crediting employee's statement that he would have constant pain in performing another job). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

D(2)(a) Claimant's Age, Background, Experience, and Physical Limitations

Claimant was born in 1954. (Tr. 19). He attended school through the eighth grade, but currently functions on a second and third grade level in reading, spelling and math. (CX 14, p. 1-2). Claimant's past work experience included mechanic work, welding, fitting and truck driving. (Tr. 20). After May 24, 1999, Claimant was able to return to work with the limitation that he only perform sit-down work and do very limited walking. These restrictions continued until October 29, 1999, when Dr. Longnecker approved Claimant for work limitations consisting of limited standing, limited walking, and no climbing or deep knee bends. On December 21, 1999, Claimant was able to work with the restrictions that he not engage in prolonged standing, walking, and/or climbing. *Id*. Claimant had a forty percent impairment to his left lower extremity. On August 30, 2002, Claimant again became totally disabled while undergoing and recovering from Dr. Longnecker's surgery to remove his hardware, and Claimant was able to return to sedentary work with an additional five percent impairment to his left lower extremity on October 14, 2002.

D(2)(b) Post Injury Wage Earning Capacity - Employer's Offer of Light Duty and the Vocational Report of Rehability, Inc.

"An award of total disability while a claimant is working is the exception and not the rule." *Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981). *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Thus, injured employees working in pain or in sheltered employment may still receive total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry*

Dock Co., 12 BRBS 10 (1980) (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979) (extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974) (beneficent employer). If the claimant is performing satisfactorily and for pay, then barring other signs of beneficence or extraordinary effort, the work precludes an award for total disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 334 (1981).

D(2)(c) Post Injury Wage Earning Capacity - Employer's Offer of Alternative Employment Within Its Facility

On May 25, 1999, Claimant began working a light duty position in employer's facility. Claimant stated that the job entailed sitting in a guard shack near the time clock and writing reports when an employee arrived late. (Tr. 35). Claimant was not required to walk around the parking lot or sign people in and out of the facility. (Tr. 35). Claimant did not assert that his employment was sheltered or beneficent employment. Accordingly, I find that Employer established suitable alternative employment within its facility when it offered Claimant a light duty job on May 25, 1999.

D(2)(d) Post Injury Wage Earning Capacity - Reduction in Force

Employer terminated Claimant's job on January 9, 2000, as part of a reduction in force. (CX 12, p. 13). Ordinarily, an employer is not a long term grantor of employment. *Olsen v. Triple A Machine Shops*, 25 BRBS 40 (1991); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). Once an injured employee establishes a *prima facie* case of total disability, is offered a light duty position or modified work in the employer's facility, and the employee is laid off due to reasons not associated with his performance, the light duty job within the employer's facility does not establish suitable alternative employment or post- injury wage earning capacity. *Northfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999) (determining that the employer made a post-injury light duty position "unavailable" through a lay-off and to rebut the employee's *prima facie* case of total disability the employer had to do more than point to its own internal light duty job); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 25 (1988) (finding that once the employer laid the injured worked off from his post-injury light duty job the suitable alternative employment was no longer available and the employer failed to prove that the injured worker could perform other work); *Becker v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 329 (ALJ 2000) (same). In this case, Claimant was terminated from his light duty position for reasons not associated with his performance on January 9, 2000.

D(2)(e) Claimant's Scheduled Injury, *PEPCO*, & Claimant's Light Duty Job in Employer's Facility

The parties stipulated that Claimant reached maximum medical improvement on December 21, 1999, with a forty-percent impairment to his left lower extremity. (ALJX 1). As noted *supra*, Claimant established a *prima facie* case of total disability, and Employer has the burden of showing that Claimant has the ability to obtain suitable alternative employment based on the *Turner* factors, and demonstrate that Claimant's disability is not total. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus*, 21 BRBS at 265; *SGS Control Serv.*, 86 F.3d at 444. Under *Potomac Electric*

Power Co. v. Director, OWCP, 101 S. Ct. 509, 449 U.S. 268, 66 L. Ed. 2d 446 (1980), an injured employee who suffers a scheduled injury is only entitled to benefits based on the schedule in Section 8(c) of the Act 33 U.S.C. § 908(c) (2002). The Schedule is only applied when a claimant has a permanent partial disability, which necessitates that the claimant reach maximum medical improvement. *Id*; *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Prior to reaching maximum medical improvement, the claimant is either entitled to temporary total disability benefits or temporary partial disability benefits. 33 U.S.C. §§ 908(b) & (e) (2002).

In *Northfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999), the Fourth Circuit determined that when an employee suffers a scheduled injury and thereafter works light duty employment in the employer's facility, that employee was entitled to an award of total disability after reaching maximum medical improvement and after being laid off from work for reasons not associated with his performance. The claimant, Hord, began his light duty employment within the employer's facility in late 1993, he reached maximum medical improvement on March 27, 1995, with a twenty percent impairment to his arm and hand, and Hord was laid off on March 18, 1996, for a period of seven weeks, due to factors not related to his performance. *Id*. at 799-800. Hord had successfully established a *prima facie* case of total disability during the period of his lay off by demonstrating that he was not able to resume his former position, and neither party argued that Hord's light duty position was not suitable. *Id*. at 800-01. The Fourth Circuit reasoned that the employer made the light duty position within its facility unavailable to Hord by virtue of the lay-off, and the employer was unable to satisfy its burden by showing Hord had a residual wage earning capacity by pointing to Hord's former light duty position. *Id*. at 801. In order to rebut Hord's *prima facie* case of total disability during a lay of period, the employer was required to identify a range of jobs that Hord could realistically secure and perform in the open labor market. *Id*.

In this case, Claimant began light duty employment within Employer's facility on May 25, 1999, and he reached maximum medical improvement following his February 15, 1999 workplace injury and subsequent surgery on December 21, 1999. (ALJX 1). When Claimant began light duty employment on May 25, 1999, he became entitled to temporary partial compensation benefits (assuming Claimant suffered an economic disability during this period), and when Claimant reached maximum medical improvement on December 21, 1999, he was entitled to compensation for a forty-percent lower extremity impairment as set out in the schedule. Like *Hord*, Claimant was terminated from his light duty employment on January 9, 2000 due to reasons not associated with his performance. Like *Hord*, Claimant demonstrated a *prima facie* case of total disability in that he was not able to resume his pre-injury employment, and his disability converted from permanent partial to permanent total following his termination until Employer made another suitable light duty job available within its facility or until Employer demonstrated that claimant could obtain suitable alternative employment in the open labor market. Accordingly, I find that Claimant's disability converted from temporary total to temporary partial on Mary 25, 1999, converted from temporary partial to permanent partial on December 21, 1999, at which time Claimant became entitled to scheduled benefits, and converted from permanent partial to permanent total on January 9, 2000.

D(2)(f) Post Injury Wage Earning Capacity - Establishing Suitable Alternative Employment Subsequent to Employer's Reduction in Force

On January 8, 2003, Mr. Tingle, a vocational rehabilitation counselor, concluded that Claimant was able to function somewhere between the sedentary and light duty categories of work. (EX 17, p. 3). Mr. Tingle identified numerous jobs in and around Claimant's community that he thought were realistically available for Claimant. *See supra*, Part III, Section D(10). Dr. Longnecker opined that Claimant could perform any of the listed jobs on a trial basis subject to his issued work limitation. (EX 30, p. 1). Likewise, I find that Claimant is capable of performing some of the jobs identified by Employer considering his age, background, experience, and physical limitations. Specifically, I find that the jobs at Gulf Coast Security Services in Bay St. Louis, Mississippi, and the job with Swetman Security in Biloxi, Mississippi, both of which are within a reasonable distance from Claimant's home, are suitable positions.

Mr. Tingle reported that all the positions he identified were periodically available between Claimant's date of injury on February 15, 1999, and his second date of maximum medical improvement of October 14, 2002. No other specific dates were provided. On February 15, 1999 Claimant was totally disabled and was unable to perform any work. *See supra*, Part IV, Section B(2). Without a specific date, I cannot make a determination of when Claimant's disability became partial. Mr. Tingle did indicate the jobs he listed were available on October 14, 2002, the day Claimant reached maximum medical improvement following his second surgery. Accordingly, I find that Employer established suitable alternative employment on October 14, 2002, and Claimant's disability converted from total to partial on that date.

D(3) Diligence

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ). The claimant need not prove that he was turned down for the exact jobs that the employer showed were available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed were available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991).

Here, Claimant testified that he never tried to apply to any of the jobs listed by Employer's vocational expert and never attempted to find any employment following his January 9, 2000 termination. (Tr. 30-33). Based on these facts, I find that Claimant has not engaged in a diligent job search such as to negate Employer's showing of suitable alternative employment. *See Emerson v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 239, 244 (1999)(ALJ) (finding diligence when the claimant lived in a remote area, there was little business and industry, claimant's disability prohibited full participation in the already limited and competitive job market, and the claimant was

compliant with a rehabilitation placement program and attempted to apply for eleven jobs, some on his own initiative); *Martin v. Marine Terminals Corp.*, 32 BRBS 338, 340 (1998)(ALJ) (finding a diligent job search when the claimant submitted a list of twenty-four prospective employers that he contacted over a four month period with whom he inquired about job opportunities, sent resumes and applications, conducted follow-up inquires to a vast range of potential employers, and credibly testified that he wanted a job to support his family but no employer would hire him because he had to use a cane).

E. Claimant's Entitlement to Benefits

As noted *supra*, Part IV, Section B(2) & D), Claimant was temporarily totally disabled until May 24, 1999. From May 25, 1999 to December 21, 1999, Claimant was temporarily partially disabled while he worked a light duty job in employer's facility. On December 21, 1999, Claimant reached maximum medical improvement with a forty-percent impairment to his left leg and became entitled to a scheduled injury pursuant to 33 U.S.C. § 908(c)(2). On January 10, 2000, Claimant's disability converted from a permanent partial scheduled injury to a permanent total injury after Claimant's light duty position was eliminated by Employer because of a reduction in force. On August 30, 2002, Claimant's disability converted from permanent total to temporary total while Claimant underwent a second surgery to remove hardware installed in his leg. On October 14, 2002, Claimant's temporary total disability converted into a permanent partial disability with an additional five-percent impairment to his leg because Employer established suitable alternative employment on that date.

As determined *supra*, Part IV, Section C(3), Claimant average weekly wage was $785.13 per week, with a corresponding compensation rate of $523.42. Thus, Claimant is entitled to receive $523.42 per week from February 16, 1999 to May 24, 1999, during his period to temporary total disability. When Claimant began working his light duty position on May 25, 1999, he earned an average of $496.31 per week.[5] Under Section 8(e) of the Act, Claimant is entitled to two-thirds the difference between his pre and post-injury earning capacity. Thus, Claimant is entitled to $117.79 from May 25, 1999 to December 21, 1999. (785.13 - 496.31 = 288.82. 288.82 x 2/3 = 192.55). On December 21, 1999, Claimant's disability became permanent with a forty percent impairment to his left leg. Under Section 8(c)(2) of the Act, Claimant was entitled to 115.2 weeks of compensation based on an average weekly wage of $785.13 per week and a corresponding compensation rate of $523.42, for a total of $60,297.98. After Employer terminated Claimant's position through a reduction in force, Claimant's disability converted from a scheduled permanent partial injury to a permanent total disability injury, compensated at the rate of $523.42 per week.

An injured worker may not receive more than his full compensation. 33 U.S.C. § 908 (2002) (providing that compensation for disability is based on two-thirds of a claimant's average weekly

[5] Claimant earned a total of $15,468.75 from May 25, 1999 to December 30, 1999. Prior to his termination on January 9, 2000, Claimant earned $840.00, for a total of $16,308.75. This is a period of 230 days, or 32.86 weeks, reflecting an average weekly earning capacity of $496.31.

wage); *I.T.O. of Baltimore v. Green*, 185 F.3d 239, 243 (4th Cir. 1999) (allowing concurrent awards but not allowing those awards to exceed the claimants' maximum compensation rate); *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 421 (9th Cir. 1995) (providing that the combined payment of dual awards cannot exceed the statutory limit set forth in Section 8(a) for permanent total disability benefits); *Padilla v. San Pedro Boat Works*, 34 BRBS 49, 53 (2000) (affirming concurrent awards of permanent partial disability up to the claimant's maximum compensation rate); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985) (holding that a permanent partial disability award under 8(c)(21) lapses during periods of temporary total disability to avoid double recovery). Accordingly, I find that Claimant is not entitled to more than two-thirds of his average weekly wage, and Employer is entitled to a credit for compensation paid pursuant to a scheduled award against its subsequent liability for permanent total disability.

On August 30, 2002, Claimant's disability converted from permanent total to temporary total, compensated at the rate of $523.42, until October 14, 2002, at which time Claimant had an additional five- percent permanent partial disability to his left leg. Because Employer demonstrated suitable alternative employment on the day Claimant reached maximum medical improvement, Claimant's disability became permanent partial and under 33 U.S.C. § 908(c)(2), Claimant became entitled to 14.4 weeks of compensation based on a weekly compensation rate of $523.42, for a total of $7,537.25.

F. Section 914(e) Penalties

Section 914(a) of Title 33 of the U.S. Code, provides that compensation "shall be paid . . . promptly . . . without an award, except where liability to pay compensation is controverted by the employer." Section 14(c) requires the employer to give notice to the deputy commissioner "upon suspension of payment for any cause." Section 14(d) requires the employer, if it "controverts the right to compensation," to file with the deputy commissioner, within fourteen days after knowledge of the alleged injury, a Notice of Controversion. Section 14(e) calls for a ten-percent penalty when pre-award benefits are not timely paid, unless the employer filed a timely Notice of Controversion. Here, Employer terminated Claimant's compensation benefits after Claimant began his light duty employment in Employer's facility on May 25, 1999. Employer did not file a Notice of Controversion until October 30, 2000. (CX 7, p. 1). Because Claimant's post–injury earning capacity was lower than his pre-injury earning capacity and Employer suspended Claimant's compensation payments without filing a timely notice of controversion, I find that Employer is liable for a ten-percent penalty on all past due compensation after suspending compensation on May 25, 1999. While ordinarily the penalty would be assessed until October 30, 2000, the date Employer filed its Notice of Controversion, Employer voluntarily began paying compensation on December 21, 1999, when it tendered $35,972.35 to Claimant under Section 8(c)(2). Under Claimant's compensation rate of $523.42, the lump sum payment represents over sixty-eight weeks of compensation payments, which is more than adequate to cover Claimant's compensation entitlement until Employer filed its Notice of Controversion on October 30, 2000. Accordingly, I find that Employer is liable for a ten percent penalty on all compensation due to Claimant between May 25, 1999 and December 21, 1999.

G. Section 8(f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the preexisting condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.*, 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. *Stokes*, 18 BRBS at 241.

In this case, Employer failed to establish its entitlement to Section 8(f) relief. Claimant's workplace injury was on February 14, 1999. On December 21, 1999, Dr. Longnecker opined that Claimant had reached maximum medical improvement with a forty-percent permanent partial

disability to his left lower extremity. (CX 13, p. 4). Employer terminated Claimant's employment on January 9, 2000. (CX 12, p. 13). On October 14, 2002, Dr. Longnecker opined that Claimant suffered an additional five-percent permanent partial disability after he removed hardware inserted in Claimant's leg following his first surgery. (CX 13, p. 1). Accordingly, there was no "second injury," rather, the nature of Claimant's original injury required two surgeries each of which left Claimant with a permanent impairment. Drs. Cope, Longnecker, and Winters all stated that it was reasonable for Claimant's hardware to be removed following his first surgery. (CX 13, p. 4; CX 15, p. 1; CX 19, p. 34). Claimant's "second injury" was nothing more than the natural progression of his February 15, 1999 workplace injury. *See Jacksonville Shipyards*, 851 F.2d at 1316-17 (denying Section 8(f) relief when the employer filed to show any work related aggravation of a pre-existing permanent partial disability).

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six-percent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six-percent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability benefits pursuant to 33 U.S.C. § 908(b) of the Act, for the period of February 16, 1999 to May 24, 1999, based on an average weekly wage of $785.13, and a corresponding compensation rate of $523.42.

2. Employer shall pay to Claimant temporary partial disability benefits pursuant to 33 U.S.C. § 908(e) of the Act for the period of May 25, 1999 to December 21, 1999, based on two-thirds the difference between Claimant's pre-injury wage earning capacity of $785.13, and his post-injury weekly wage earning capacity of $496.31, resulting in temporary partial disability compensation in the amount of $192.55 per week.

3. Under 33 U.S.C. § 914(e) of the Act, Employer shall pay a ten percent penalty on all compensation due between May 25, 1999 and December 21, 1999.

4. Employer shall pay to Claimant 115.2 weeks of compensation pursuant to 33 U.S.C. § 908(c)(2) of the Act for a forty-percent permanent partial impairment to Claimant's left leg based on a compensation rate of $523.42, for a total of $60,297.98.

5. Employer shall pay to Claimant permanent total disability benefits pursuant to 33 U.S.C. § 908(a) of the Act for the period of January 10, 2000 to August 30, 2002, based on an average weekly wage of $785.13, and a corresponding compensation rate of $523.42. This award runs concurrently with Claimant's award for a scheduled injury and Claimant is never entitled receive more than two-thirds his average weekly wage per week.

6. Employer shall pay to Claimant temporary total disability benefits pursuant to 33 U.S.C. § 908(b) of the Act, for the period of August 31, 2002 to October 14, 2002, based on an average weekly wage of $785.13, and a corresponding compensation rate of $523.42.

7. Employer shall pay to Claimant 14.4 weeks of compensation pursuant to 33 U.S.C. § 908(c)(2) of the Act for a five-percent permanent partial impairment to Claimant's left leg based on a compensation rate of $523.42, for a total of totaling $7,537.25.

8. Employer shall be entitled to a credit for all compensation paid to Claimant after February 15, 1999.

9. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

10. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

11. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge